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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 883

STATNI BANKA CESKOSLOVENSKA,

Petitioner,

—against—

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Banka,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

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The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above cause on November 1, 1962, reargument of which was denied by said Court of Appeals by its order entered December 6, 1962.

OPINIONS BELOW

The decision of the Court of Appeals affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York, without opinion, and upon the opinion of the said Appellate Division. The memorandum

decision of the Court of Appeals is printed as Appendix B at page 5a and is reported at 12 N. Y. 2d 784. The dissenting opinion of Judge Burke, of said Court of Appeals, is printed as Appendix C and is reported at 12 N. Y. 2d 783. It there appears as a dissenting opinion in a companion case [*Stephen, et al. v. Zivnostenska Banka*, 12 N. Y. 2d 781] but is intended to apply as a dissenting opinion in this cause also (See 12 N. Y. 2d 785).

The opinion of said Appellate Division (Statni Record,* pp. 106-108) and Appendix D-1, is reported at 15 A. D. 2d 103 and 222 N. Y. S. 2d 140. The said opinion of the Appellate Division refers, in part, for its reasons, to the opinion of the same Court in the companion case of *Stephen, et al. v. Zivnostenska Banka*, which is printed in the Zivnostenska Record at page 263 and as Appendix D-2, p. 11a and is reported at 15 A. D. 2d 111 and 222 N. Y. S. 2d 128. The dissenting opinion of Stevens, *J.*, of said Appellate Division is printed in the Zivnostenska Record at page 280 and as Appendix E is reported at 15 A. D. 2d 120 and 222 N. Y. S. 2d 138.

The opinions of the Supreme Court, New York County in this case, on the original motion and on reargument, are printed at pages 75 and 98 of the Statni Record; they are not published in any law reports. The opinions of said Court on the original motion and renewed motion in the companion case are printed in the Zivnostenska Record at pages 235-243 and 243-252, respectively, and are reported in 23 Misc. 2d 855 (199 N. Y. S. 2d 797) and 213 N. Y. S. 2d 396, respectively.

No petition for writ of certiorari has been filed in the *Zivnostenska* case, but because of its close relationship to this case and the fact that the decisions written in the

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* The record in this case is referred to as the Statni Record; the record in the companion case of *Stephen, et al. v. Zivnostenska Banka* is referred to as the Zivnostenska Record.

Statni case refer to or are related to those written in said companion matter, petitioner is furnishing herewith copies of the record on appeal to the New York Court of Appeals in both cases.

JURISDICTION

The judgment of the New York Court of Appeals was made and entered on the first day of November, 1962 (Appendix A-1) and petitioner's motion for reargument of its appeal, which had resulted in said judgment, was denied by order of said Court of Appeals made and entered on the sixth day of December, 1962 (Appendix A-2). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

The Attorney General of the United States, acting on the request of the Secretary of State of the United States presented to the Supreme Court of the State of New York, a Suggestion of Immunity wherein he certified to said Court, in part, that

> "A letter from the Secretary of State to the Attorney General of the United States (Exhibit 'A') states that the Department of State recognizes and allows the claim of the Government of Czechoslovakia that the Statni Banka Ceskoslovenska as a government instrumentality of the State of Czechoslovakia is immune from suit and accepts as true the statement of fact of the Czechoslovak Government that the listed accounts and securities constitute the property of the State of Czechoslovakia and that consequently the United States Government recognizes and allows the claim of the Czechoslovak Government that the Statni Banka Ceskoslovenska is immune from suit and

that such property in the United States should be released from the attachment imposed in the pending proceedings."

The Suggestion further stated, in part, that

"* * * the United States does have an interest and concern in the subject matter and outcome of this action insofar as there is involved the question of immunity from suit and attachment of the property of the Government of the State of Czechoslovakia, and the undersigned * * * suggests that the claim of immunity made on behalf of the said Czechoslovak Government and recognized and allowed by the Department of State be given full force and effect and that the accounts and securities heretofore seized pursuant to orders of this Court be released" (Statni Record pp. 51 to 70, and particularly, ff. 202 to 210).

Upon such unequivocal Suggestion of Immunity, the Supreme Court of the State of New York, granted petitioner's motion to dismiss the action and release the property so certified to be immune. The Appellate Division of said Court, on plaintiff's appeal, modified by reinstating the restraints upon said property, although affirming dismissal of the action. The Court of Appeals of the State of New York, on petitioner's appeal, affirmed the judgment of said Appellate Division. Thus, notwithstanding such Suggestion of Immunity, the property certified to be immune has not been released from the judicial restraints imposed thereon.

The questions presented are:

1. Whether the Suggestion of Immunity submitted to the Court on behalf of the Secretary of State was not so binding upon the Court, in view of the doctrine of Separation of Powers, as to preclude further inquiry by the Court into any of the matters determined by said Suggestion of Im-

munity and so as to require the Court to release the property certified by the Secretary of State to be immune and the release of which the Secretary of State requested?

2. Whether the Court had the right to give only partial effect to the Suggestion of Immunity and to deny release of the property while at the same time recognizing the immunity of petitioner from suit and dismissing this action against it?

3. Whether the Court had the right to inquire into and review the reasoning and motives of the Secretary of State in arriving at the determination set forth in the said Suggestion of Immunity?

4. Whether the Federal policy, as expressed in the Suggestion of Immunity, of extending recognition to the claims of the Czechoslovak Government affecting the property here involved, based on the legislative acts of that Government, did not supervene the New York public policy, as expressed in Section 977b of the New York Civil Practice Act, with respect to the nationalization of foreign corporations and the distribution of the New York assets thereof among creditors?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, Section 1 of the Constitution of the United States, insofar as relevant, provides: "The executive Power shall be vested in a President of the United States of America."

The pertinent provisions of Public Law 85-604 (22 U. S. C. 1642, *et seq.*) are set forth as Appendix F at pages 27a to 30a. The pertinent provisions of Section 977b of the New York Civil Practice Act are set forth as Appendix G at pages 31a to 34a.

The Suggestion of Immunity filed by the Department of State is set forth in the Statni Record at pages 51-70.

STATEMENT

On May 12, 1952, an action was commenced in the New York Supreme Court by Otto Augstein and another against Zivnostenska Banka, National Corporation. This action was brought under New York Civil Practice Act § 977b for the appointment of a Receiver of the New York assets of said defendant upon the ground that it had been nationalized by decree of the Czechoslovak Government. The action was commenced by an *ex parte* order of May 12, 1952 (Appendix D-2, pp. 13a, 14a) which restrained transfer of the assets of the defendant as well as of the assets which, on the date of the order, stood in the name of the Statni Banka Ceskoslovenska, the petitioner herein. That action resulted in a final judgment on August 6, 1956 (Zivnostenska Record pp. 19-26) appointing Edwin B. Wolchok, the respondent herein, as such Receiver. Appeals from said judgment to the Appellate Division and the Court of Appeals of New York resulted in affirmance, and that defendant's appeal to the Supreme Court of the United States on constitutional grounds, was dismissed by this Court on March 10, 1958 (356 U. S. 22) for want of a substantial federal question.

In March, 1959, the said Receiver commenced the present action against petitioner wherein he alleged that assets of Zivnostenska Banka had been transferred to petitioner in fraud of creditors, and wherein he sought to impress a trust on the New York assets of the petitioner (Statni Record pp. 45-50). In this action, also, plaintiff obtained an *ex parte* order (Statni Record pp. 25-30) restraining transfer of petitioner's assets and appointing himself temporary receiver thereof pending the further order of the Court. Whereas the 1952 order in the Zivnostenska action applied to petitioner's assets in New York only as of May 12, 1952 (Appendix D-2, pp. 13a, 14a) the March 25, 1959, order in the present action covered any of petitioner's assets whenever received in New York at any time before or since 1952 and

applies to all such future assets which may ever come into New York, as well.

At this point, the State Department interested itself in both cases and at its request the attorneys for defendants in both cases noticed motions for the purpose of presenting the issue of immunity to the New York Supreme Court (Statni Record, pp. 9-12, 76-77; Zivnostenska Record, pp. 14-15, 164-167). In the Zivnostenska action the defendant's motion for release of the property certified to be immune was denied any effect whatsoever and such denial was affirmed all the way through the New York Court of Appeals, but no application to this Court for writ of certiorari has been made in that case.

In the present action, the petitioner moved for dismissal of the action and for release of the property which the Secretary of State, in the Suggestion of Immunity, certified to be immune. The New York Supreme Court eventually granted petitioner's motion, dismissed the action and released the said property (Statni Record pp. 5-8) but the Appellate Division (and by its judgment of affirmance, the Court of Appeals) reimposed the restraints upon all of the property involved although affirming the dismissal of the action upon the ground of petitioner's immunity from suit (Statni Record pp. 103-105, 107-108).

The status of this action, therefore, is that the same has been fully and finally dismissed, but that the property standing in petitioner's name and certified by the Secretary of State to be immune, remains under the Court's restraint pending the further order of the Court. Although petitioner moved for reargument of its appeal to the Court of Appeals and specifically pointed out the anomaly of continuing "temporary" restraints in an action which has been dismissed as well as the anomaly of recognizing the petitioner's immunity from suit, but denying immunity for its property, the Court of Appeals denied the motion (Appendix A-2, p. 4a).

This is therefore a final determination denying immunity for property which has been certified to be immune by the Secretary of State, and unless it is reversed, the only way in which the Czechoslovak Government could protect its rights would be by waiving its immunity and the immunity of the petitioner, and actively appearing in this action and defending its rights in judicial proceedings.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals of the State of New York should be reviewed by this Court because said judgment erroneously refused to accept as absolutely binding upon it, the Suggestion of Immunity filed at the request of the Secretary of State, contrary to all existing decisions of this Court and contrary to all prior precedent.

The issues clearly present a Federal question of substance, involving the conflicting powers of the Federal Government and the judiciary of the State of New York. The determination of which review is sought interferes with the efforts of the Federal Government, as certified to the Court by the Secretary of State, to negotiate a settlement of the international controversy between the United States and Czechoslovakia looking toward compensation to American citizens for property nationalized by the Czechoslovak Government (Appendix D-2, pp. 21a, 22a). Notwithstanding that the State Department of the United States, which has exclusive competence under the President, for the conduct of the relations between the United States and Czechoslovakia, has certified to the New York courts that the property restrained and seized by said courts, is the property of the government of Czechoslovakia, and is immune from such restraint or seizure, the New York courts have flatly refused to be bound by such certification. Instead, although they have recognized petitioner's immunity from this suit, they have refused to release the property standing in its name from the restraints imposed thereon pending this action.

All prior decisions of this Court as well as of other Federal courts, and all prior decisions of the New York State courts, have held that a conclusive Suggestion of Immunity from the Secretary of State precludes the courts from further inquiry as to any of the matters determined by said Suggestion.

Ex Parte Peru, 318 U. S. 578;

The Exchange, 7 Cranch 116;

Compania Espanola, etc. v. *The Navemar*, 303 U. S. 68;

Republic of Mexico, et al. v. *Hoffman*, 324 U. S. 30;

United States v. *Lee*, 106 U. S. 196;

Ex Parte Muir, 254 U. S. 522;

The Pesaro, 255 U. S. 216;

Lamont v. *Travelers Insurance Company*, 281 N. Y. 362;

United States of Mexico v. *Schmuck*, 293 N. Y. 264, and 294 N. Y. 265;

Rich v. *Naviera Vacuba S. A.*, 197 Fed. Supp. 710, and 295 Fed. 2d 24;

Isbrantsen & Co. v. *Netherlands East Indies Government, et al.*, 75 Fed. Supp. 48;

Piascik v. *British Ministry of War Transport*, 54 Fed. Supp. 487;

The Malikos, 41 Fed. Supp. 697;

The Ioannis P. Goulandris, 39 Fed. Supp. 630, and 40 Fed. Supp. 924.

The rule and the reason for the rule are succinctly set forth in *Ex Parte Peru*, *supra*, pages 588, 589, as follows:

> "That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' United States v. Lee, 106 U. S. 196, 209. More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune. When such a seizure occurs the friendly foreign sovereign may present its claim of immunity by appearance in the suit and by way of defense to the libel. Compania Espanola v. The Navemar, *supra*, 74 and cases cited; Ex parte Muir, *supra*. But it may also present its claim to the Department of State, the political arm of the Government charged with the conduct of our foreign affairs. Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations. Compania Espanola v. The Navemar, *supra*, 74; The Exchange, 7 Cranch 116. This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings."

In this specific case, the importance of the doctrine has been made clear by the Department of State itself, when it informed the Court that the release of the property of the Czechoslovak Government as certified to it by the Department was necessary to the conclusion of negotiations between the United States and Czechoslovakia for a settlement of the claims of American citizens arising from the nationalization program of the Czechoslovak Government (Zivnostenska, Record pp. 175-179, 180) (Appendix D-2, pp. 21a, 22a) and apparently the refusal of the New York courts to abide by the State Department request has thus far prevented the conclusion of such negotiations which are still pending. The dissenting opinion of Judge Burke of the New York Court of Appeals further emphasizes the importance of the question involved. It specifically points out that the insistence of the New York courts upon retaining jurisdiction to determine the rights of the Czechoslovak Government runs counter to the Federal policy of attempting to obtain compensation for American citizens and he cites in support of his view *U. S. v. Pink*, 315 U. S. 203, and Public Law 85-604, 72 Stat. 528 (22 U. S. C. 1642, *et seq.*).

By the determination of which review is here sought, the New York courts have overturned the traditional concept that a foreign government is not subject, against its will, to have its rights determined in an American court. The Court's determination in this case is stated to be "for the reasons stated in Stephen v. Zivnostenska Banka, decided herewith" (Statni Record p. 108, f. 323). The opinion in the Zivnostenska action (Zivnostenska Record pp. 263-279) shows that the Court concluded that the State Department has no power to bind the Court.

The Court held, in part:

> "Ownership and title to the said property necessarily involves the legal effect and implications of the final judgment herein and the public policy of

the State of New York in the light of Section 977b concerning property in the custody of the court. It would not seem that the pendency of negotiations between the Department of State and the Czechoslovak Government with reference to claims of American citizens referred to in the letter of the Department of State of May 12, 1960 [Zivnostenska Record, pp. 175-180] is to be equated with a compact or treaty overriding the public policy of the State of New York reflected in Section 977b (See *United States* v. *Pink*, 315 U. S. 203; *Anderson* v. *N. V. Transandine Handelmaatschappij*, 289 N. Y. 9; *Bollack* v. *Societe Generale*, 263 App. Div. 601). Moreover, the suggestion of immunity disclaims any interest on the part of the United States.

"The adjudication of rights to property in the custody of the court and within its jurisdiction is a judicial function (*Lamont* v. *Travelers Ins. Co.*, 281 N. Y. 362, 372, 373; *Sullivan* v. *State of Sao Paulo*, 122 F. 2d 355, 358; *Banco De Espana* v. *Federal Reserve Bank*, 114 F. 2d 438, 442; see *United States* v. *Bank of New York*, 296 U. S. 463."

None of the authorities cited by the Court in the foregoing quotation deals with an unequivocal Suggestion of Immunity and these cases are not apposite where such a Suggestion has been presented (*Republic of Mexico* v. *Hoffman*, *supra*).

The dissenting opinion of Judge Stevens of the Appellate Division, held, in part:

"When, however, the Department of State elected to act and filed a Suggestion of Immunity which recognized and allowed the claim of the Czechoslovak Government, the effect of such suggestion is to eliminate

> nate the necessity for such government to prove ownership of the property in question, and it imposed a duty upon our courts to hold such property exempt from execution" (Appendix E, p. 25a).

And the dissenting opinion of Judge Burke of the New York Court of Appeals, held, in part:

> "In view of *United States* v. *Pink*, 315 U. S. 203, it must be recognized that State policy must give way in the face of the assertion of a federal interest in the disposition of litigation affecting foreign relations * * *. The federal policy of compensating United States citizens and the fund available for that purpose would be undermined by the application of the New York policy, as applied below, of using the funds in question to compensate *creditors generally* of Zivnostenska Bank" (Appendix C, pp. 6a, 7a). [Emphasis from the Opinion.]

It is clear, moreover, that the Court did not consider, separately, the effect of the Suggestion of Immunity in this case filed with respect to this petitioner and the assets standing in its name. The Court's opinion refers to the fact that, in the year 1952, a request for immunity for property standing in the name of Statni Banka Ceskoslovenska had been made by the Government of Czechoslovakia, insofar as the same was restrained in the Zivnostenska action. That request had been submitted to the New York court "without argument or comment" by the State Department.

In the present action, however, the Secretary of State advised the Court that "The transfers [from Zivnostenska Banka to Statni Banka Ceskoslovenska] were not made in the course of commercial transactions (activities *jure gestionis*) by the defendant Statni Banka Ceskoslovenska, and consequently constitute public acts of the State of Czechoslovakia in transferring funds and properties from one Czechoslovak Government unit to another" (Statni Record pp. 55, 56).

The issue whether the transfers to the petitioner herein were in fraud of creditors of the Zivnostenska Banka was one which, in the absence of petitioner's immunity from this suit would have to be tried in this action. The Suggestion from the Secretary of State, however, removed that issue from the sphere of judicial inquiry, by certifying that the transfers were public acts of the Czechoslovak Government and that the assets involved are immune. It is this specific certification in this action which the courts of New York have refused to accept, contrary to the principles repeatedly recognized by this Court.

We submit that, on the basis of all precedent, this Court would have held that the supervening power of the Federal Government and the doctrine of Separation of Powers required the New York courts to accept and enforce the request for immunity recognized and allowed by the Secretary of State.

The questions presented involve an important and substantial Federal question which the New York courts have decided in a manner directly contrary to the law as determined by repeated decisions of this Court

CONCLUSION

FOR THE REASONS ABOVE SET FORTH, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK SHOULD BE GRANTED.

LEMUEL SKIDMORE,
Attorney for Petitioner,
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New York 6, N. Y.

APPENDIX A-1

(Judgment of the Court of Appeals)

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of November, in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding

RAYMOND J. CANNON,
Clerk.

REMITTITUR November 1, 1962.

No. 197

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Bank, National Corporation,

Respondent,

vs.

STATNI BANKA CESKOSLOVENSKA, Etc.,

Appellant.

BE IT REMEMBERED, that on the 8th day of May in the year of our Lord one thousand nine hundred and sixty-two, Statni Banka Ceskoslovenska, etc., the appellant—in this cause, came here unto the Court of Appeals, by Putney,

Twombly, Hall & Skidmore, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Edwin B. Wolchok as Receiver of Zivnostenska Bank, National Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by Alexander Slater and Abraham Wolf, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed:

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Lemuel Skidmore, of counsel for the appellant, and by Mr. Sigmund Timberg, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs, upon the opinion of the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, etc, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be en-

forced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's office,
Albany, November 1, 1962.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(Seal)

APPENDIX A-2

(Order of the Court of Appeals Denying Motion for Reargument)

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of December A. D. 1962.

Present, HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

1 Mo. No. 789

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Bank, National Corporation,

Respondent,

vs.

STATNI BANKA CESKOSLOVENSKA, a k a STATE BANK OF CZECHOSLOVOKIA, etc., et al.,

Appellant.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL,
Deputy Clerk.

(Seal)

APPENDIX B

(Memorandum Decision of Court of Appeals)

STATE OF NEW YORK

COURT OF APPEALS

1 No. 197

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Bank, National Corporation,

Respondent,

vs.

STATNI BANKA CESKOSLOVENSKA, &c.,

Appellant.

OPINION

Unrevised and Uncorrected.
Not for Publication.

Order affirmed, with costs, upon the opinion at the Appellate Division. No opinion. All concur except Burke, J., who dissents in an opinion.

APPENDIX C

(Dissenting Opinion of Burke, J., of N. Y. Court of Appeals)

BURKE, *J.*, (Dissenting):

I dissent and vote to reverse. The property in dispute here is specific property consisting of securities presently held by several New York banks for the account of the Zivnostenska Banka and were held by that bank in the New York banks as a custodian for the various private owners. According to the United States State Department, the government of Czechoslovakia acquired title to these securities through Czech. Law No. 128 1946 which provided for escheat where claimants to the property did not file restitution claims within three years. The Zivnostenska Banka then became 'custodian' of these securities for the benefit of the Czechoslovakian government. Apparently, then, there are no claimants to this specific property—indeed the appellant expressly disavows any claim of sovereign immunity in respect to certain securities to which one Gellert asserts title. Surely, neither Stephen (whose complaint was dismissed because of the statute of limitations), nor Augstein (who commenced the action under Civil Practice Act § 977 as a creditor of Zivnostenska Banka and personally recovered only costs), asserts such a claim.

So, as between the receiver who holds the property under statutory authority for the benefit of the general creditors of all sorts as set forth in Civil Practice Act § 977, and the Czechoslovakian government, which claims under a prior public act of Czechoslovakia, the efficacy of which is recognized by the Executive branch of the federal government, charged as it is with the conduct of our foreign relations, the title of the Czechoslovakian government must prevail. In view of *United States* v. *Pink*, 315 U. S. 203, it must be recognized that State policy must give way in the

face of the assertion of a federal interest in the disposition of litigation affecting foreign relations. In *Pink*, it was recognition of Russia, plus assignment of Russian claims to the United States government; here it is a suggestion of immunity together with an established federal procedure* for devoting Czechoslovakian property to the satisfaction of the claims of United States citizens damaged through Czechoslovakian nationalization decrees. The federal policy of compensating United States citizens and the fund available for that purpose would be undermined by the application of the New York policy, as applied below, of using the funds in question to compensate *creditors generally* of Zivnostenska Banka. The orders appealed from should be reversed.

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* Public Law 85-604, 72 Stat. 528, establishes a fund under Treasury Department control for the purpose of compensating United States citizens for property lost through the Czechoslovakian nationalization program.

APPENDIX D-1

(Opinion of N. Y. Appellate Division)

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

October 1961

Benjamin J. Rabin, *J. P.*,
James B. M. McNally,
Harold A. Stevens,
Samuel W. Eager,
Aron Steuer, *JJ.*

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Bank, National Corporation,

Plaintiff-Appellant,

—against—

STATNI BANKA CESKOSLOVENSKA, also known as State Bank of Czechoslovakia, etc., *et al.*,

Defendant-Respondent.

4129

Appeal from order of the Supreme Court at Special Term (Lupiano, *J. P.*, entered March 16, 1961, in New York County, which granted defendant's motion for reargument, vacated service of the summons and released certain securities which had been restrained from transfer by prior orders.

SIGMUND TIMBERG, of counsel (Alexander Slater and Abraham Wolf, attorneys) for plaintiff-appellant.

LEMUEL SKIDMORE, of counsel (Howard F. Ordman with him on the brief; Putney, Twombly, Hall and Skidmore, attorneys) for defendant-respondent.

McNALLY, *J.*:

Plaintiff-appellant, Edwin B. Wolchok is the receiver appointed by the court in the case of *Stephen v. Zivnostenska Banka*, decided herewith. Defendant-respondent Statni Banka Ceskoslovenska is the statutory successor of the defendant in the Zivnostenska action under Czechoslovakia Law No. 31 of March 9, 1950. The securities involved in this action are subject to restraining orders issued by the court in *Stephen v. Zivnostenska Banka*.

The receiver was appointed to take, receive and reduce to possession the assets of defendants. On May 12, 1952 an order was made for the examination of several banks and a stock brokerage firm and restraining them from disposing of monies and securities in the name of Zivnostenska Banka or its successor Statni. On May 21, 1952 the court entered an order limiting the restraining provisions of the order of May 12, 1952 to the monies and securities in the name of Zivnostenska and Statni as of May 13, 1952. Subsequently a court appointed referee tried issues referred to him in the Zivnostenska action and that decision passed through our courts (155 N. Y. S. 2d 340, aff'd 2 A. D. 2d 958, aff'd 3 N. Y. 2d 862). Finally, defendant's appeal to the United States Supreme Court was dismissed for want of a substantial Federal question (356 U. S. 22, 78 S. Ct. 560, 2 L. Ed. 578). After the United States Supreme Court decision the receiver instituted this action on March 24, 1959 in aid of the receivership to collect assets belonging to Zivnostenska. On March 26, 1959 the receivership in the Zivnostenska action was extended to this action.

Asserting sovereign immunity the defendant Statni moved to dismiss the complaint and to vacate the restraining order insofar as it affected property allegedly of the Republic of Czechoslovakia. The court below granted said defendant's motion to vacate and set aside service of the summons, dismissed the action and directed the release and discharge of said property from the restraints imposed by prior orders of the court.

For the reasons stated in *Stephen* v. *Zivnostenska Banka*, decided herewith, the order entered March 16, 1961 is modified, on the law and on the facts, without costs, and that portion thereof which directs the release and discharge of property in the names of Zivnostenska Banka and Statni from the restraints imposed by prior orders of the court is reversed and vacated; the order, as so modified, is otherwise affirmed.

The Government of the United States has suggested immunity and thus allowed the claim of the Government of Czechoslovakia to the effect that the respondent is immune from suit, a political determination which binds the courts of this State and has the effect of withdrawing the cause from the sphere of litigation (*Ex parte Peru*, 318 U. S. 578; *Compania Espanola de Navegacion Maritima S.S.* v. *The Navemar*, 303 U. S. 68; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Matter of United States of Mexico* v. *Schmuck*, 293 N. Y. 264).

All concur except Stevens, *J.*, who dissents and votes to affirm.

APPENDIX D-2

(Opinion of Appellate Division in Companion Case, Referred to in Opinion in Present Case)

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

October, 1961.

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN,
Plaintiff,

—and—

OTTO AUGSTEIN,
Plaintiff-Respondent,

—against—

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank,
Defendant-Appellant,

EDWIN B. WOLCHOK,
Receiver-Respondent.

Benjamin J. Rabin, *J.P.*
James B. M. McNally,
Harold A. Stevens,
Samuel W. Eager,
Aron Steuer,

4127-4128

Appeals, (1) from an order of the Supreme Court at Special Term (Lupiano, J.), entered April 13, 1960, in New

York County, which denied defendant's motion for a modification of prior restraining orders and judgment and releasing therefrom such property as the Department of State of the United States has certified as immune from execution as the property of the Government of Czechoslovakia; and (2) from the order entered March 16, 1961, which denied defendant's renewed motion for similar relief.

SAMUEL SKIDMORE, of counsel (Howard F. Ordman with him on the brief; Putney, Twombly, Hall & Skidmore, attorneys) for defendant-appellant.

SIGMUND TIMBERG, of counsel (Alexander Slater and Abraham Wolf, attorneys) for receiver-respondent.

NICHOLAS R. DOMAN, of counsel (Doman & Ablondi, attorneys) for plaintiff-respondent Otto Augstein.

McNALLY, *J.*

The question presented is the legal effect of the suggestion of sovereign immunity dated June 26, 1959 and letters amendatory thereto on the judgment herein entered August 6, 1956.

The action is grounded on section 977-b of the Civil Practice Act which expresses and implements the public policy of the State of New York not to enforce foreign confiscatory decrees as to property within the State. (*Bollack v. Societe Generale*, 263 App. Div. 601). The judgment in favor of plaintiff Otto Augstein and against defendant Zivnostenska Banka, National Corporation (herein designated Zivno Banka, N. C.), successor of Zivnostenska Banka, decrees that Zivno Banka, N. C. was nationalized within the meaning of section 977-b, has ceased to function and exist, and is incapable of meeting its obligations; it appoints permanent receivers of defendant's assets within the State of New York, provides for the marshaling of its assets, the

presentation of claims, the adjudication thereof, the submission of the receivers' account and the settlement thereof on notice. The complaint was dismissed as to plaintiff John A. Stephen by reason of the limitation of subdivision 23 of section 977-b.

Defendant was organized in Prague, Czechoslovakia, in 1869. It was licensed to transact business within this State on May 18, 1948. The license expired March 20, 1949 and was not renewed. Prior to 1948 the defendant was a stock corporation. Decree No. 102 of October 24, 1945 of the President of the Republic of Czechoslovakia nationalized its banks; it provided for but there is no proof of compensation to stockholders. On August 5, Zivno Banka, N. C. was registered on the records of the Commercial Register, District Civil Court in Prague, as an enterprise for domestic and foreign banking and exchange and other transactions as provided by regulations and orders, especially with respect to the requirements of the planned economy of Czechoslovakia; the owner was stated to be Czechoslovak State consequent on Decree No. 102 of 1945. Law No. 31 of 1950 of Czechoslovakia established Statni Banka Ceskoslovenska (herein designated Statni Banka), merged therein four banks including the defendant, and provided for the assumption by Statni Bank of the rights and obligations of the constituent banks.

Plaintiff Augstein is a native of Czechoslovakia. He lived there until 1939 when he emigrated to England and thence in 1940 to Canada where he became a citizen in 1945. Prior to 1939 Augstein was and since has been a depositor of and by reason thereof a substantial creditor of the defendant.

On May 3, 1952 an order was made appointing temporary receivers of the defendant and its property. On May 12, 1952 various banks and Kidder, Peabody & Co. were restrained from transferring property of the defendant and Statni Bank and directed to appear for examination con-

cerning the defendant's property. On May 21, 1952 the restraining order of May 12, 1952 was limited to the property in the hands of the depositories at the time of its service.

On May 26, 1952 the Charge d'Affaires ad interim of Czechoslovakia represented to the Department of State that Statni Bank is an organ of the Czechoslovak Government, enjoys sovereign immunity and is unwilling to subject itself or its property to the jurisdiction of the Supreme Court of the State of New York. The Department of State on June 4, 1952 requested the Attorney General to instruct the appropriate United States Attorney to "present to the Court without argument or comment the position of the Government of Czechoslovakia as set forth in the note." Prior thereto, on May 19, 1952, the Department of State made a statement of policy regarding the practice of the Government of the United States in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent. (Tate Letter, 26 Department of State Bulletin, June 23, 1952, pp. 984-985; see *National City Bank of N. Y. v. Republic of China*, 348 U. S. 356, 361). It noted the conflicting concepts of sovereign immunity represented by the classical or absolute theory and the restrictive theory whereby immunity is limited to sovereign or public acts (*jure imperii*) and not recognized as to private acts (*jure gestionis*). The statement concludes: "Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."

The request of the Department of State of June 4, 1952 was consistent with the policy defined in the Tate Letter.

The note of the Czechoslovak Government dated May 26, 1952 did not suggest immunity as to the defendant. On the contrary it affirmed: "The two above-named plaintiffs instituted an action against Zivnostensko banka, national corporation [the defendant], which immediately took steps to appear in the action and will doubtless be able to repudiate the unjustified and unfounded claims raised by the plaintiffs." The request for immunity was limited to Statni Bank and its property.

Defendant served its answer on June 23, 1952 and its amended answer on April 20, 1953. The amended answer alleged as a first defense that defendant is an agency and instrumentality of the Republic of Czechoslovakia and shares its immunity, and as a second defense the six-year statute of limitations.

On the hearing of the motion to examine the various depositories, numerous issues, including the defendant's claim of immunity, were presented and referred by order dated October 24, 1952 to a referee to hear and report. The said issues, by consent, included: (1) whether plaintiff Augstein is a creditor of the defendant; (2) whether defendant was nationalized; (3) whether defendant has property in the State of New York; (4) the defense of the statute of limitations; (5) the issue of sovereign immunity of defendant and Statni Bank; and (6) the exemption of certain of the seized securities from the seizure in this proceeding. The report of the referee filed July 21, 1954 resolved the issues in favor of the plaintiff, except as to nationalization of the defendant and plaintiff's status as a creditor. The order entered March 25, 1955 modified said report to the extent of finding the plaintiff to be a creditor of the defendant, confirming it otherwise, and set the cause for trial on April 25, 1955, (140 N. Y. S. 2d 323, affd. 286 App. Div. 999). The cause was tried and resulted in the determination that the defendant was nationalized within the meaning of section 977-b. Final judgment was thereon entered on August 6, 1956 (155 N. Y. S. 2d 340, 2 A. D. 2d

958, affd. 3 N. Y. 2d 862, appeal dismissed 356 U. S. 22, 78 S. Ct. 560, 2 L. Ed. 578).

On July 1, 1958 an order was made appointing a referee to hear and report on the defendant's property and directing the depositories to submit to examination concerning property held by them in the names of the defendant and Statni Bank. On March 24, 1959 the receiver of the defendant commenced an action (herein designated Statni Action) to set aside transfers of property from the defendant to Statni Bank pursuant to Law No. 31 of 1950 of Czechoslovakia alleged to be in fraud of defendant's creditors. On March 26, 1959 an order was made in this action extending the receivership to the Statni Action.

In January, 1959 the Ministry of Foreign Affairs of Czechoslovakia requested the United States Government to effect the release of certain assets in the hands of the described depositories subject to the restraint of the order of May 12, 1952, and continued in the judgment herein entered August 6, 1956. The said request was premised on the claim that the said assets are property of the Czechoslovakia State. The request for release was limited by the note of the Ministry of Foreign Affairs dated June 16, 1959 to blocked assets of the Czechoslovak State, more particularly described in annexes 1 and 2 thereof.

On June 22, 1959 the Attorney General was requested by the Department of State "to present to the court the views of the Department and also to inform the court that the Department of State accepts as true the statements of fact of the Czechoslovak Government in its note of June 16, 1959, above that the attached securities as listed in annexes 1 and 2 of that note constitute the property of the State of Czechoslovakia. Consequently, the United States Government recognizes and allows the claim of the Czechoslovak Government that such property in the United States is immune from execution or other action analogous to execution."

The Department of State communication of June 22, 1959 states that the property affected by the claim of immunity is part of the securities and deposits subject to the order of May 12, 1952, which fall into three categories: (1) those in the name of and owned by the defendant; (2) those in the name of the defendant "which it claims it holds as custodian for private individuals"; and (3) those "deposited in the name of the Statni Banka Ceskoslovenska and Zivnostenska Banka, which the Czechoslovak Government claims to be its property." The property falling into category (3) is listed in two annexes to the Czechoslovak Government note. It is with regard to these securities and deposits that the Czechoslovak Government has asked for foreign sovereign immunity and that they be released from the attachment.

The communication of the Department of State of June 22, 1959 with reference to this action also states:

> "The defendant Zivnostenska Banka appeared in the proceedings. The Statni Banka Ceskoslovenska, although not a party to the proceedings, appeared as *amicus curiae* and filed a claim of immunity as to its property affected by the above restraining order.
>
> "In a note dated May 26, 1952, from the Charge d'Affaires *ad interim* of Czechoslovakia, The Czechoslovak Government stated that the Statni Banka Ceskoslovenska, as a governmental organ, enjoyed sovereign immunity, and asked that its attached property be released.
>
> "The Department's letter of June 4, 1952, requested you to instruct the appropriate United States Attorney to appear before the New York Supreme Court, County of New York, to present to the court without argument or comment the position of the Government of Czechoslovakia as set forth in its above note of May 26, 1952, as a matter of comity.
>
> "* * * *."

"The Department is of the view that, in international law under the restrictive rule of sovereign immunity there is no immunity from jurisdiction regarding the private activities (*jure gestionis*) of a foreign sovereign. Since the Zivno Bank was engaged in commercial activities it was appropriate for the court to retain jurisdiction to arrive at a judgment after a hearing on the merits of the plaintiff's claims.

"However, the Department has always recognized a distinction between 'immunity from jurisdiction' and 'immunity from execution'. The Department has maintained the view that in accordance with international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit.

"As you will recall there is precedent for not permitting execution of a judgment obtained in a proceeding when the foreign sovereign has consented to suit. *Dexter and Carpenter, Inc.* v *Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir., 1930) cert. den. 282 U. S. 896 (1931); followed in *Bradford* v *Chase National Bank*, 24 F. Supp. 28, 38 (D. C. S. D. N. Y. 1938), aff'd, *sub. nom. Berger, et al.* v. *Chase National Bank*, 105 F. 2d 1001 (2d Cir., 1939), 309 U. S. 632 (1940).

"The Department is of the further view that, where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited. In many cases jurisdiction could probably not be obtained otherwise. But property so attached to obtain jurisdiction over the defendant government cannot be retained to satisfy a judgment ensuing from the suit because in accordance with inter-

national law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit."

The suggestion of immunity dated June 26, 1959 submitted to the Supreme Court of the State of New York, County of New York, by the United States Attorney for the Southern District reads, in part:

"The letter from the Secretary of State to the Attorney General of the United State (Exhibit 'A') accepts as true the statement of fact of the Czechoslovak Government that the listed cash and securities constitute the property of the State of Czechoslovakia and that consequently the United States Government recognizes and allows the claim of the Czechoslovak Government that such property in the United States is immune from execution or other action analogous to execution.

"In compliance with the request of the Secretary of State of the United States and the Attorney General of the United States, it is respectfully requested that these facts be considered by this Court.

"In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, but the undersigned presents this Suggestion of Immunity as a matter of comity between the Government of the United States and the Government of Czechoslovakia, and suggests that the claim of immunity made on behalf of the said Czechoslovak Government and recognized and allowed by the Department of State be given full force and effect and that the property heretofore seized pursuant to order of this Court be released and held to be immune from execution or proceedings analogous to execution."

No claim or suggestion of immunity is made in regard to the defendant Zivno Banka, N.C. or the property in the first category. The said defendant's property falls within the the first of the three categories described in the communication of the Department of State dated June 22, 1959, and the suggestion of immunity relates only to the third category.

Upon being advised of the action of the Department of State, the defendant, by notice of motion dated June 22, 1959, moved to modify the judgment of August 6, 1956, the order of May 12, 1952, and orders incidental thereto, to vacate the restraining provisions thereto affecting property of the Republic of Czechoslovakia. On the hearing of said motion there were submitted to the court the representations of the Republic of Czechoslovakia, the request of the Department of State and the suggestion of immunity aforesaid. In addition, there was submitted to the court a letter of the Department of State dated December 15, 1959 which in part, states:

> "As Mr. Evan was advised on a recent visit to this office, the suggestion of immunity filed in the Zivnostenska Banka case by the United States Attorney at the instance of the Department of State was not intended to be a determination by the Department of any controversy between his client and the Government of Czechoslovakia as to the ownership of any securities involved in the case or to deprive his client of the opportunity of establishing ownership of any securities. It follows that the Department had no intention of suggesting that any property not owned by the Government of Czechoslovakia was immune from execution or from proper disposition by the Court.
>
> "In order that the Department's position may be clear, it is requested that the United States Attorney for the Southern District of New York be instructed

to appear at the hearing which, it is understood from Mr. Evan's letter, is to be held on December 16, 1959, before the referee appointed in this case and make known the Department's position, if necessary, by filing a copy of this letter as a part of the record."

The order entered April 13, 1960 denied the motion to modify the judgment herein and the said orders. Thereafter, by order to show cause dated May 12, 1960, the defendant moved for reargument. On the reargument there was submitted to the court a copy of the letter of the Department of State dated May 12, 1960 addressed to the Assistant Attorney General which states, in part:

"The Department's letter of December 15, 1959, referred to by the Court should be read in the light of the Department's previous letter of June 22, 1959, and of the particular situation to which it was addressed. The December letter meant only that if Mr. Gellert or any other claimant in the case could prove to the Court that specific property listed by the Czechoslovak Government in the Annexes to its note as property of the State actually belonged to him as a matter of Czechoslovak law rather than to the Czechoslovak State because, for instance, the particular law in question was not intended to apply to the property or because he had complied with the necessary legal requirements to recover the property, then the sovereign immunity of the Czechoslovak State did not extend to such property. It did not mean that the Czechoslovak Government could be required to prove in Court its ownership of property to which its claim had already been recognized and allowed by the Department of State.

"It should be noted in connection with the foregoing that the Governments of the United States and of Czechoslovakia are in the concluding phase of negotiations for the settlement of claims arising out of

the nationalization by Czechoslovakia of property of American citizens who were such at the time their property was nationalized. The position of the Czechoslovak Government is that the lump sum now agreed upon in principle in settlement of such claims will be reduced pro tanto by the market value of those properties deposited in accounts of Zivnostenska Banka and Statni Banka and attached or sequestered in judicial proceedings, as to which sovereign immunity is suggested, but which are not released. It appears, therefore, that an amount equivalent to the value of any such property as to which sovereign immunity is not recognized would not become available for distribution to persons who were United States citizens at the time of the nationalization of their property by Czechoslovakia, or in other words, those citizens whose claims are normally espoused by the United States in accordance with customary international law."

The motion to reargue, on consent, was deemed one to renew the motion to modify the judgment herein and the restraining orders, and denied by order entered March 16, 1961, which together with the order denying the said motion are the subject of this consolidated appeal.

It has been conclusively determined in this action that the defendant and its property are not within the ambit of the sovereign immunity of the Republic of Czechoslovakia. The suggestion of immunity herein does not purport to recognize the right of immunity on the part of the defendant or in respect of its property. It is, therefore, indisputable that the judgment and the restraining orders are operative as to all property of the defendant in the custody of the court. In this action, as in the companion action by the receiver against Statni Bank, it is sought to establish the ownership by the defendant of the securities and deposits purportedly in the name of Statni Bank allegedly transferred

by the defendant to Statni Bank in fraud of creditors. Counsel for Statni Bank on January 30, 1953 conceded before the referee there were transfers from defendant to Statni Bank. Although counsel for Statni Bank then appeared as *amicus curiae*, its claim of immunity in respect of the securities and funds then in the custody of the court standing in its name was litigated and determined against it. The instant suggestion of immunity advanced in behalf of the Republic of Czechoslovakia pertains to the same property.

The communication of the Department of State dated June 22, 1959 requesting the Attorney General to submit to the court its suggestion of immunity adverts to *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen* (43 F. 2d 705, cert. den. 282 U. S. 896) and *Bradford* v. *Chase National Bank* (24 F. Supp. 28, 38, affd. *sub. nom. Berger, et al.* v. *Chase National Bank*, 105 F. 2d 1001, 309 U. S. 632) which vindicate the immunity of the property of a sovereign state from execution after adjudication of its liability. Reliance on the cited authorities serves to emphasize that the Department of State accepts the claim of ownership of the Republic of Czechoslovakia. The Department's letter of December 15, 1959 makes clear, however, that it did not assume to determine disputed issues of title in respect of property claimed by the Government of Czechoslovakia. Ownership of and title to the said property necessarily involves the legal effect and implications of the final judgment herein and the public policy of the State of New York in the light of Section 977-b concerning property in the custody of the court. It would not seem that the pendency of negotiations between the Department of State and the Czechoslovak Government with reference to claims of American citizens referred to in the letter of the Department of State of May 12, 1960 is to be equated with a compact or treaty overriding the public policy of the State of New York reflected in Section 977-b (See *United States* v. *Pink*, 315 U. S. 203; *Anderson* v. *N. V. Transandine Handel-*

maatschappij, 289 N. Y. 9; *Bollack v. Societe Generale*, 263 App. Div. 601). Moreover, the suggestion of immunity disclaims any interest on the part of the United States.

The adjudication of rights to property in the custody of the court and within its jurisdiction is a judicial function (*Lamon v. Travelers Ins. Co.*, 281 N. Y. 362, 372-373; *Sullivan v. State of Sao Paulo*, 122 F. 2d 355, 358; *Banco De Espana v. Federal Reserve Bank*, 114 F. 2d 438, 442; see *United States v. Bank of New York*, 296 U. S. 463). In this action defendant has been dealt with as a corporate jural entity, separate and distinct from the Republic of Czechoslovakia. The same holds true of Statni Bank. The suggestion of immunity from execution of the property of the Republic of Czechoslovakia does not avail the defendant and has no application to its property (*See Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189; *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 261 App. Div. 1). We find that the suggestion of immunity does not preclude judicial determination of title to the assets of the defendant in the custody of the court allegdly transferred in fraud of defendant's creditors to Statni Bank or the Republic of Czechoslovakia (See *Matter of United States of Mexico v. Schmuck*, 294 N. Y. 265).

Rich v. Naviera Vacuba (U. S. C. A., 4th Cir., No. 8448, decided Sept. 7, 1961) relied on by appellant is inapposite. There the ownership and possession was of the Republic of Cuba, not, as here, a separate entity, and the suggestion of immunity was advanced prior to any judicial determination; moreover, it appeared the presence of the libeled vessel within the court's jurisdiction was consequent on an act of barratry by the shipmaster.

The orders should be affirmed, with costs to respondents.

All concur except Stevens, J., who dissents in part in opinion.

APPENDIX E

(Dissenting Opinion of Stevens, J., of N. Y. App. Div.)

STEVENS, *J.* (Dissenting in part):

I would modify to release from the restraint property in the 3rd category not claimed by American citizens or by specific persons as to whom appellant has not by direct act recognized a contrary ownership. As to such specific claimants, they should be permitted to prove that under the law of Czechoslovakia such property actually belongs to them. As to the other property here involved, where there are conflicting claims of title to the assets between the appellant bank and the Receiver as representative of the general creditors, such property should be immune from execution, and the restraints heretofore imposed by the judgment and orders appealed from modified to free the property listed in Annexes 1 and 2, subject to the exceptions noted. When the action was instituted originally in 1952 our Government failed to issue a Suggestion of Immunity. It merely submitted the claim of the Czech Government without argument or comment, and to that extent took no affirmative position. This of course did not bar the Czech Government or its official agent, the Statni Bank, successor to Zivnostenska Bank and into which the Zivnostenska Bank was merged, from appearing and asserting its claim that it was immune from suit. *Cf. Compania Espanola de Navegacion Maritima, S. A. v. Navemar*, 303 U. S. 68. It is clear that there was jurisdiction in our courts to entertain the suit. When, however, the Department of State elected to act and filed a Suggestion of Immunity which recognized and allowed the claim of the Czechoslovak Government, the effect of such suggestion is to eliminate the necessity for such government to prove ownership of the property in question, and it imposed a duty upon our courts to hold such property exempt from execution. Moreover, such claims, under these circumstances, as a matter of com-

ity, should be given recognition by our court. The Suggestion recognizes the sovereignty of Czechoslovakia and should be given retroactive effect as to all assets not specifically identified by individual claimants and whose ownership has been recognized and established. See discussion in *Sokoloff v. National City Bank*, 239 N. Y. 158. The validity of the Czech law providing for the filing within three years of claims for restitution should not be questioned here insofar as it applies to Czech nationals or those who are not American citizens, particularly where the original debtor-creditor relationship between the Zivnostenska Bank and the depositor was not created here, and that government has now been recognized *de jacto* or *de jure* (*cf. Salminoff & Co. v. Standard Oil Co.*, 262 N. Y. 220. See also, 11 Am. Jur., Conflict of Laws, § 6). It is established that the courts of one independent government will not sit in judgment "on the validity of the acts of another done within its own territory." *Ricaud v. American Metal Co.*, 246 U. S. 304; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Underhill v. Hernandez*, 168 U. S. 250, 253. We merely accept the rule when such government is recognized by ours. When a foreign government is recognized "as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions of the government so recognized from the commencement of its existence." *Oetjen v. Central Leather Co., supra*, p. 303.

This case, while at one phase resembling in certain aspects the *Navemar* case, *supra*, may now be distinguished from it. In that case the Department of State refused to act and referred the Spanish Ambassador to the courts. The verified suggestion of the Ambassador was tendered in support of an application to appear as claimant. And in *Mexico v. Hoffman*, 324 U. S. 30, the court merely refused to enlarge the immunity to an extent which our government had not seen fit to recognize. The claim of the Mexican Government was recognized but was not allowed. Both cases discuss the effect of a suggestion of immunity.

In this case admittedly the securities to which the Czech Government claims title through the Zivnostenska Bank are not in its possession. However, it must be assumed that all relevant factors were considered and weighed by our Department of State before it recognized and allowed the immunity. Having so, it becomes the duty of the courts to accept such recognition and allowance as the rule for their decision. See, *Ricaud* v. *American Metal Co.*, 246 U. S. 304; 30 Am. Jur., International Law, §§ 48 to 50. See also, *Rich, et al.* v. *Naviera Vacuba and Republic of Cuba*, U. S. Dist. Ct., E. Dist. (Va.) op. dated August 29, 1961, aff'd Cir. Ct. of Appeals, 4th Cir., September 7, 1961.

APPENDIX F

(Pertinent Provisions of Public Law 85-604 [22 USC 1642, et seq.])

§1642a. Financial provisions. Deposit of proceeds of certain property.

(a) The Secretary of the Treasury is directed to hold, in an account in the Treasury of the United States, the net proceeds of the sale of certain Czechoslovakian steel mill equipment heretofore blocked and sold in the United States by order of the Secretary of the Treasury under authority of Executive Order Numbered 9193, dated July 6, 1942 (7 F.R. 5205, July 9, 1942).

Creation of Czechoslovakian Claim Fund

(b) There is created in the Treasury of the United States a fund to be designated the Czechoslovakian Claims Fund, for the payment of unsatisfied claims of nationals of the United States against Czechoslovakia as authorized in this subchapter.

Voluntary settlement and payment of claims of nationals of the United States

(c) If, within one year following August 8, 1958, the Government of Czechoslovakia voluntarily settles with and pays to the Government of the United States a sum in payment of claims of United States nationals against Czechoslovakia, all moneys held pursuant to subsection (a) of this section shall be disposed of in accordance with the terms of the settlement agreement with Czechoslovakia and applicable provisions of this subchapter and the sum paid by Czechoslovakia shall be covered into the Czechoslovakian Claims Fund.

Deposit of net proceeds into Fund

(d) Upon the expiration of one year after August 8, 1958 if no settlement with Czechoslovakia of the type specified in subsection (c) of this section has occurred, all moneys held pursuant to subsection (a) of this section except amounts held in reserve pursuant to section 1642b of this title, shall be covered into the Czechoslovakian Claims Fund.

§ 1642c. Determination of validity and amount of claims

The Commission shall determine in accordance with applicable substantive law, including international law, the validity and amount of claims by nationals of the United States against the Government of Czechoslovakia for losses resulting from the nationalization or other taking on and after January 1, 1945, of property including any rights or interests therein owned at the time by nationals of the United States, subject, however, to the terms and conditions of an applicable claims agreement, if any, concluded between the Governments of Czechoslovakia and the United States within one year following August 8, 1958. In making the determination with respect to the validity and amount of claims and value of properties, rights, or interests

taken, the Commission is authorized to accept the fair or proved value of the said property, right, or interest as of a time when the property or business enterprise taken, was last operated, used, managed or controlled by the national or nationals of the United States asserting the claim irrespective of whether such date is prior to the actual date of nationalization or taking by the Government of Czechoslovakia. Mar. 10, 1950, c. 54, Title IV, § 404, as added Aug. 8, 1958, Pub. L. 85-604, § 1, 72 Stat. 528.

§ 1642d. Nationality requirements

A claim under section 1642c of this title shall not be allowed unless the property upon which the claim is based was owned by a national of the United States on the date of nationalization or other taking thereof and unless the claim has been held by a national of the United States continuously thereafter until the date of filing with the Commission. Mar. 10, 1950, c. 54, Title IV, § 405, as added Aug. 8, 1958, Pub L. 85-604, § 1, 72 Stat. 528.

§ 1642l. Payment of awards—Manner of payment

(a) The Secretary of the Treasury is authorized and directed out of the sums covered into the Czechoslovakian Claims Fund, to make payments on account of awards certified by the Commission pursuant to this subchapter as follows and in the following order of priority:

(1) Payment in the amount of $1,000 or in the amount of the award, whichever is less.

(2) Thereafter, payments from time to time on account of the unpaid balance of each remaining award made pursuant to this subchapter which shall bear to such unpaid balance the same proportion as the total amount in the fund available for distribution at the time such payments are made bears to the aggregate unpaid balance of all such awards.

Regulations

(b) Such payments, and applications for such payments, shall be made in accordance with such regulations as the Secretary of the Treasury shall prescribe.

Definition

(c) For the purpose of making any such payments, an "award" shall be deemed to mean the aggregate of all awards certified in favor of the same claimant.

Payment of interest of deceased persons or persons under legal disability

(d) If any person to whom any payment is to be made pursuant to this subchapter is deceased or is under a legal disability, payment shall be made to his legal representative, except that if any payment to be made is not over $1,000 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates.

Partial payments

(e) Subject to the provisions of any claims agreement hereafter concluded between the Governments of Czechoslovakia and the United States, payment of any award pursuant to this subchapter shall not, unless such payment is for the full amount of the claim, as determined by the Commission to be valid, with respect to which the award is made, extinguish such claim, or be construed to have divested any claimant, or the United States on his behalf, of any rights against any foreign government for the unpaid balance of his claim. Mar. 10, 1950, c. 54, Title IV, § 413, as added Aug. 8, 1958, Pub.L. 85-604 § 1, 72 Stat. 530.

APPENDIX G

(Pertinent Provisions of N. Y. Civil Practice Act, § 977-b)

§ 977-b. Receivers to liquidate local assets of foreign corporations

1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the State of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business, whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

* * * * *

11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the State of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be

less than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

* * * * *

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in the state thereof and the allowed claims based on causes of action which accrued or arose in the State of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or else-

where, provided such receiver or liquidator has proved his right thereto.

* * * * *

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the State of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter, shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the State of New York, and to all litigation heretofore or hereafter brought in the courts of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its

domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile.

SUPREME COURT, U. S.

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No. 883

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATNI BANKA CESKOSLOVENSKA, PETITIONER

v.

EDWIN B. WOLCHOCK, AS RECEIVER OF ZIVNOSTENSKA BANKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated April 22, 1963, the Solicitor General was invited to express the views of the United States. For the reasons indicated below, we believe that this case does not warrant review by writ of certiorari.

1. This case is so closely interrelated with another case which is not before the Court, *Stephen* v. *Zivnostenska Banka*, that in order to discuss the issues

presented by the petition it is necessary to review the facts out of which both cases arise and to trace the development of both.

In 1945, the Czechoslovak government nationalized the Zivnostenska Banka, a private stock corporation which had assets on deposit in New York banks. In 1950, petitioner Statni Banka was created by Czechoslovak Law No. 31, and the Zivnostenska Banka was merged into the Statni Banka. Law No. 31 provided for the assumption by Statni Banka of the rights and obligations of Zivnostenska Banka, and some time thereafter title to certain of the New York assets was transferred from Zivnostenska Banka to Statni Banka.

In 1952, a creditor of Zivnostenska Banka brought an action (*Stephen* v. *Zivnostenska Banka*) in the Supreme Court of New York under Section 977-b of the New York Civil Practice Act. That section provides for the appointment of a receiver of assets located in the State and owned by a foreign corporation which has been nationalized (Section 977-b(1)) and vests title to those assets in the receiver (Section 977-b(19)); Section 977-b(16) provides for the payment of these assets to creditors and claimants of the nationalized foreign corporation. Pursuant to this provision, an order was issued appointing temporary receivers of the Zivnostenska Banka and its property located in New York, and another order was entered restraining various New York banks from transferring property deposited with them in the names of the Zivnostenska Banka and the Statni Banka.

The Statni Banka appeared as *amicus curiae* in this action and filed a claim of sovereign immunity as to its property affected by the restraining order. On

May 26, 1952, the Czechoslovak government represented to the Department of State that the Statni Banka, as a governmental organ, enjoyed sovereign immunity and asked that its property be released from the attachment. On June 4, 1952, the State Department asked the Department of Justice to present the position of the Czechoslovak government to the court "without argument or comment," as a matter of comity, and this was done. A number of issues, including Statni Banka's immunity, were referred to a referee; the immunity issue was determined against Statni Banka. The state Supreme Court confirmed this ruling, 140 N.Y.S. 2d 323, affirmed, 286 App. Div. 999, 145 N.Y.S. 2d 310, and eventually entered an order determining that the conditions precedent to the operation of Section 977-b were present and continuing in force the orders restraining transfer of the property deposited in the New York banks in the names of the Zivnostenska Banka and Statni Bank. 155 N.Y.S. 2d 340, affirmed, 2 App. Div. 2d 958, 157 N.Y.S. 2d 904, affirmed, 3 N.Y. 2d 862, 145 N.E. 2d 24, remitter added, 3 N.Y. 2d 931, 145 N.E. 2d 889, appeal dismissed for want of a substantial federal question, 356 U.S. 22 (1958).

On July 1, 1958, an order was entered by the state Supreme Court appointing a referee to hear and report on Zivnostenska Banka's property and directing the New York depositaries to submit to examination concerning the property held by them in the names of Zivnostenska Banka and Statni Banka. Then on March 24, 1959, the receiver for Zivnostenska Banka brought the present action (*Wolchok* v. *Statni Banka Ceskoslovenska*) in the Supreme Court to set aside transfers of property from Zivnostenska Banka to

Statni Banka on the ground that they had been made in fraud of Zivnostenska Banka's creditors; the receiver secured an ancillary order restraining the depositaries of property held in the name of Statni Banka from transferring it.

In January 1959 the Czechoslovak government requested the Department of State to effect the release of the property subject to the restraining orders then in effect. On June 26, 1959, at the request of the Department of State, the Department of Justice filed with the court in the *Zivnostenska Banka* case a Suggestion of Immunity to the effect that the State Department accepted as true the Czechoslovak government's representation that it owned certain assets restrained by the orders in that case; that, since Zivnostenska Banka had been engaged in commerical (not governmental) activities, such property was subject to attachment for purposes of retaining jurisdiction; but that, since the property was owned by the Czechoslovak government, it would be immune from execution. On the same day, also at the request of the State Department, the Justice Department filed in the present case (*i.e.*, the *Statni Banka* case) a Suggestion of Immunity to the effect that the State Department accepted as true the Czechoslovak government's representation that it owned certain assets covered by the restraining order in this case; that, since the Statni Banka is a government instrumentality of Czechoslovakia, it is immune from suit and its property is immune from attachment; and that such property should be released.

Thereupon, petitioner Statni Banka moved that the present action be dismissed and that the property that was the subject of the Suggestion of Immunity herein

be released. Zivnostenska Banka also moved that the restraining order in the *Zivnostenska Banka* case be vacated insofar as it affected property claimed by the government of Czechoslovakia. Subsequently, in December 1959 and May 1960, two additional letters from the Department of State were submitted in the *Zivnostenska Banka* case (which was before the same court as the present case); their purport was that the State Department, in the communication on which the Suggestion of Immunity therein was based, had not intended to resolve any genuine dispute as to the ownership of the property in question and that such issues were for judicial determination.

The state Supreme Court granted Statni Banka's motion to dismiss the instant case against it, on the ground that Statni Banka was immune from suit; the court also released the claimed property from the restraining order it had issued in this case. In the *Zivnostenska Banka* case, however, the court held that the question of ownership of the claimed property remained for judicial determination, and it declined to release the property that had been subject to its prior orders in the *Zivnostenska Banka* case. On appeal of the *Zivnostenska Banka* case, the Appellate Division affirmed, holding that the adjudication of rights to property in the custody of the court and within its jurisdiction is a judicial function and that the Suggestion of Immunity could not preclude judicial determination of title to the assets before the court; moreover, the court concluded, the State Department's subsequent letters seemed to recognize this principle. This decision was affirmed by the New York Court of Appeals; review was not sought in this Court.

On appeal of the Supreme Court's order of dismissal and release in the instant case, the Appellate Division affirmed the dismissal as to Statni Banka on account of its immunity from suit. However, it reversed the Supreme Court's order directing the release and discharge of property that had been subject to the prior restraining order issued in this case, on the apparent ground that the said property is also subject to the restraining orders in the *Zivnostenska Banka* case, in which questions as to the true ownership of the property remained to be determined. The New York Court of Appeals affirmed, with one judge dissenting.

2. Petitioner's primary reason for seeking the writ is its assertion that the decisions of the New York courts have frustrated the Department of State in what it was attempting to accomplish in its suggestions of immunity in this and the *Zivnostenska Banka* cases. On the contrary, the primary result sought to be achieved by the Suggestion of Immunity filed in this case—that the courts should not exercise jurisdiction over a foreign State or its instrumentality—has been fully realized by the final dismissal of this suit against Statni Banka (see pp. 5, 6, *supra*). No such result is required in the *Zivnostenska Banka* case, since neither Czechoslovakia nor the Department of State has ever suggested that Zivnostenska Banka was an instrumentality of the Czechoslovak government.

Moreover, there is no clear conflict between decisions of the state courts and the State Department's position with respect to genuine disputes over the ownership of property claimed by a foreign State. The Department did not, nor does it now, pass judg-

ment upon the true ownership of the property that is the subject of these suits. It is the Department's position, reflected in the letters filed in the *Zivnostenska Banka* case (see p. 5, *supra*), that such a question is appropriate for judicial determination. Cf. Restatement, Foreign Relations Law of the United States, Section 75(2) (A.L.I. Proposed Official Draft 1962); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30.

Nor is there any merit to petitioner's contention (see Pet. 8) that the decisions below interfere with negotiations between this country and the Czechoslovak government concerning the settlement of claims arising out of Czechoslovakian nationalization of the property of American citizens. An understanding with the Czechoslovak government concerning such property has already been reached. Under that understanding, the amount of money the United States will receive in settlement of outstanding claims against the Czechoslovak government will be reduced to the extent of any property claimed in these cases by the Czechoslovak government but not ultimately released to it.[1] Thus, neither the settlement negotiations nor the relations between the two countries will be affected by the outcome of these cases.

3. Petitioner in its reply brief attacks the premise of the Appellate Division that the property subject to the restraining order in this case is also subject to the restraining orders in the *Zivnostenska Banka* case; petitioner argues that the order in this case is much broader and covers much more property than the orders in the other case. If that be so, the appropriate

[1] In the event none of the property claimed by Czechoslovakia in these cases is released to it, the amount of money to be received by the United States will be reduced by one million dollars.

source of relief would be the New York state courts. The allegedly undue breadth of the restraining order would not seem to raise a federal question.

In view of the considerations set forth above, we do not believe that grant of the petition for a writ of certiorari is warranted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 883

STATNI BANKA CESKOSLOVENSKA, *Petitioner,*

— against —

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Banka, *Respondent.*

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Walker v. Gibson, 37 Ill. App. 335 8
Whiteside v. Pendergast, 2 Barb. Ch. 471 8
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OTHER AUTHORITIES CITED

Bishop, New United States Policy Limiting Sovereign Immunity, 47 American Journal of International Law (1953) 11

High on Receivers (4th Ed.), Sections 437, 833 8

Lauterpacht, Problem of Jurisdictional Immunity of Foreign State, 28 British Yearbook of International Law 220 (1951) 11

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---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner's basic position is that, given the doctrine of separation of powers, the "unequivocal" suggestion of immunity by the State Department *in this case* requires the release, from the custody of the Court, of property standing in the name of Statni Banka speci-

fied by the State Department in its suggestion. This fallaciously simple statement of the issue is only possible because the petition either ignores or misconceives certain fundamental facts.

First, the property in question is in the custody of the Court, not by virtue *of this proceeding*, but by virtue of an *in rem* Final Judgment *in another case, Stephen* v. *Zivnostenska Banka,* which appellant does not, and cannot, ask this Court to review. Also, in the proceedings leading up to said Final Judgment, the issue of the immunity of petitioner Statni Banka and its property was conclusively adjudicated against it. Moreover, far from the State Department's attitude on Statni's immunity being unequivocal and in accord with the doctrine of separation of powers, its several communications to the Court on this subject have been mutually inconsistent and have shown unjustified encroachment by the Executive Branch on the judicial power.

To set the problem in its true perspective, it will be necessary to restate facts ignored by petitioner, but covered in the opinion of the Appellate Division, which was adopted by the Court of Appeals.*

STATEMENT

Stephen v. *Zivnostenska Banka* is an *in rem* action commenced under Section 977-b of the New York Civil Practice Act. At the outset of this action, the claim of immunity in respect of Statni's property was raised by a letter dated June 4, 1952, in which the State De-

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* The opinion of the Appellate Division in *Stephen* v. *Zivnostenska Banka* is reprinted on pages 11a to 24a of the petition, and references to it will take the form, e. g., of "Op. App. Div., p. 23a."

partment requested the Attorney General to instruct the appropriate U. S. Attorney to present to the Supreme Court for New York County (hereinafter referred to as the "Trial Court"), "without argument or comment," the position of the Czechoslovak government. That position, as set forth in a note from Czechoslovak Chargé d'Affaires, was that, as an organ of the Czechoslovak government, Statni Banka and its property enjoyed sovereign immunity. Following the receipt of this correspondence, the Court ordered its Referee to hear and report on, among other matters, the issue of Statni's immunity. In trying this issue and making his report, the Referee followed the criteria laid down in another State Department letter, the so-called Tate-letter of May 19, 1952, which set forth the general practice of the government of the United States in connection with sovereign immunity. Op. App. Div., p. 14a. That letter was appended as an annex to the Referee's report. (Record on Appeal from the Trial Court's Order of March 12, 1955, ff. 676-690).

In the litigation, counsel for Statni Banka, who appeared as *amicus curiae* and requested that the Court pass upon the issue of sovereign immunity, was given full opportunity to present evidence (*ibid.* ff. 729, 2177, 2181-90); cross-examine witnesses (*ibid.*, f. 624), enter exceptions (*ibid.*, 1515); make oral arguments and file briefs (*ibid.*, ff. 2198, 2265). After extensive hearings, the issue of sovereign immunity was determined adversely to Statni Banka, in conformity with the policy laid down in the above-cited State Department letter of May 19, 1952. It is to be noted that counsel conceded that there were transfers of property from Zivnostenska Banka to Statni Banka, its statutory successor. The order of the Trial Court confirming, *inter alia*, the Referee's ruling that Statni Banka and

its property were not entitled to sovereign immunity was entered March 25, 1955, and was sustained by the Appellate Division. Since the issue was abandoned in the subsequent appellate proceedings, it was, in the words of the Appellate Division in this, the most recent appeal, "litigated and determined" against Statni Banka. Op. App. Div., pp. 15a, 23a.

The Final Judgment in *Stephen* v. *Zivnostenska Banka* was entered on August 6, 1956, and the appellate litigation therefrom was concluded on March 10, 1958, when this Court dismissed the appeal from said Final Judgment, 356 U.S. 22. On June 22, 1959, fifteen months after this Court's action and almost three years after the entry of said Final Judgment, the State Department presented a suggestion of immunity in *Stephen* v. *Zivnostenska Banka*. Among the categories of securities and deposits for which immunity was claimed were those "deposited in the name of the Statni Banka Ceskoslovenska and Zivnostenska Banka, which the Czechoslovak Government claims to be its property." In reliance on this suggestion of immunity, a motion was made in the Trial Court to modify the Final Judgment of August 6, 1956. The trial Court denied that motion, as well as a later motion to renew the motion to modify, and these denials were sustained by the Appellate Division and the Court of Appeals (23 Misc. 2d 855, *aff'd* 15 App. Div. 2d 111, *aff'd* 12 N.Y. 2d 781). See Op. App. Div., pp. 16a-22a. No application to this Court for writ of certiorari has been made (see petition, p. 7), and the time for making such application has expired.

The present proceeding was commenced by a complaint filed by the Permanent Receiver, appointed pursuant to the August 6, 1956 Final Judgment, against Statni Banka, which is the statutory successor of

Zivnostenska Banka, the defendant under said judgment. It will clarify the issues in this case to set forth, in chronological order, the six letters from the State Department that are relevant to the issue of sovereign immunity as raised in this proceeding:—

1. On June 4, 1952, in *Stephen* v. *Zivnostenska Banka*, the State Department issued the letter, described on pages 2-3, above, which in effect referred the problem of Statni Banka's immunity to the Trial Court for its determination, without taking any position thereon.

2. The judicial determination, in *Stephen* v. *Zivnostenska Banka*, that Statni Banka and property standing in its name were not entitled to sovereign immunity was reached on the basis of a State Department letter of May 19, 1952, outlining the general position of the State Department with respect to sovereign immunity, see page 3, above.

3. On June 22, 1959, in *Stephen* v. *Zivnostenska Banka*, the State Department suggested immunity for assets standing in the name of Statni Banka. This suggestion, as pointed out earlier, was overruled by the New York courts, and the validity of this action is not subject to review by this Court (see page 4, above).

4. On June 22, 1959, the State Department issued the letter suggesting immunity in this proceeding that is relied on by petitioner.

5. On December 15, 1959, the State Department wrote a letter to the effect that its June 22, 1959 letter was not intended to deprive persons, making claim to specific property for which immunity had been claimed in the June 22 letters, of the opportunity of establishing that they in fact owned the securities (*ibid.*, pp. 20a, 21a.) This letter was found by the Trial Court to

be beyond the proper province of the Executive Department, because it created a hybrid standard of sovereign immunity and made sovereign immunity dependent on the nature of the person *against which* the claim of immunity was asserted rather than on the nature of the party or entity *on behalf of which* the claim was asserted (see the opinion of the Trial Court, Appendix A to this brief, pp. 6a-8a).

6. On May 12, 1960, the State Department addressed still another letter, in which it further trespassed on the judicial province. Specifically, that letter indicated that the State Department intended, by its June 22, 1959 and December 15, 1959 letters, that, in the proof made by any claimant of specific securities, Czechoslovak law was to apply, and that the claimant, rather than the Czechoslovak Government, had the burden of proof of establishing ownership. See Op. App. Div., pp. 21a, 22a and Appendix A, p. 8a hereto. Other phases of this unique letter are discussed later in this brief (see pp. 10-11, below).

The Trial Court originally, after the receipt of Letters 4 and 5, declined to follow the suggestion of immunity (see Statni Record, pp. 75-76). Subsequently, after receiving Letter 6, it entered an order dismissing the complaint and directing the release and discharge of Statni property from the restraints imposed by prior orders of the Court. The Appellate Division modified the order of the Trial Court for the reasons stated in its opinion in *Stephen* v. *Zivnostenska Banka*, by reversing and vacating the provision thereof which directed the release and discharge of property standing in the names of Zivnostenska Banka and Statni (15 App. Div. 2d 103; p. 10a of petition). This order was upheld by the Court of Appeals (12 N.Y. 2d 784; p. 5a of petition).

THE DECISION BELOW RESTS ON NON-FEDERAL GROUNDS

The petition is premised on the erroneous proposition that the suggestion of immunity with respect to Statni Banka presented to the Trial Court in *this* proceeding (State Department letter No. 4, p. 5, above) required not only the dismissal of the complaint in *this* proceeding (which was done), but also the release, from the custody of the court, of property standing in the name of Statni Banka. This ignores the fact that that property is in the custody of the court by virtue of an *in rem* Final Judgment (that of August 6, 1956), in *another* state court proceeding, *Stephen* v. *Zivnostenska Banka*, which is not subject to review here (see pp. 3-4, above). Since the refusal to release the property was based on such a final state court judgment, it rests on a non-federal ground.

Assuming *arguendo* that the Final Judgment of August 6, 1956, in *Stephen* v. *Zivnostenska Banka*, were otherwise subject to review by this Court in this proceeding, the Trial Court's denial of Statni Banka's claim of immunity (see pages 5 to 6, above) was *res judicata* and the law of the case and, as such, binding on the courts. See *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116. The denial of the claim "was conclusive and binding upon the parties as respects that controversy," and does not raise a federal question, *Pink* v. *United States*, 315 U.S. 203, 216.

Still a third indication that the issue raised by petitioner was decided on a non-federal ground is petitioner's argument, made to the appellate courts below and referred to on page 7 of the petition, that the dismissal of the complaint brought by the Permanent Receiver necessitated the dismissal of the order extending his receivership to assets standing in the name of Statni

Banka. This argument is based exclusively on considerations of New York law. The following authorities support the court below in upholding the continued functioning of the receiver in such a situation:—*Colwell* v. *Garfield National Bank*, 119 N.Y. 408; *Baksi* v. *Wallman*, 272 App. Div. 422, 752; *Williams* v. *Montgomery*, 148 N.Y. 519; *Whiteside* v. *Pendergast*, 2 Barb. Ch. 471, 474-3; *McCosker* v. *Brady*, 1 Barb. Ch. 329, 346; see also High on Receivers (4th Ed.), Secs. 437, 833; *Fountain* v. *Mills*, 111 Ga. 122; *Walker* v. *Gibson*, 37 Ill. App. 335.

It is accordingly clear that the New York courts' denial of petitioner's motion to release property standing in the name of Statni Banka may be predicated on alternative state law grounds, and does not raise a federal question.

THE PETITION FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION, OR AN ISSUE OF GENERAL IMPORTANCE

In addition to the fact that the issue raised by petitioner was decided on non-federal grounds, this case rests on its own peculiar and complicated facts. The petition otherwise fails to present a substantial federal question, or a federal question sufficiently important to justify review by this Court.

In the first place, reviewing the unusual series of State Department communications in this case (see pages 5 to 6, above), it seems clear that the State Department's position on sovereign immunity, for from being "unequivocal" (see pp. 4, 12 of the petition), might well be characterized as wavering, confused and contradictory. Also, the State Department's violations of the doctrine of separation of powers in

this case (noted on page 6, above), do not seem to square with petitioner's insistence on the applicability of that doctrine, which is basic to its position (see pp. 4, 5 and 14 of petition).

Contrary to petitioner's contention (see p. 10), the record shows that the procedure set forth in *Ex Parte Peru*, 318 U.S. 578, 588, 589, petitioner's main reliance, was followed in the present case. That case restates the rule that a claim of immunity may be presented to the court in one of two ways, (1) by appearance and defense in the suit, or (2) by recognition and allowance, and certification to the court, by the State Department. The latter was the procedure followed in the cases cited on page 9 of the petition. However, in *Stephen* v. *Zivnostenska*, the claim of immunity for Statni and its property was presented to the court in the first way, and "litigated and determined against it" (see pages 3 to 4, above). Moreover, the foreign sovereign consented to have its claim to immunity adjudicated by the court (see p. 3, above), and such a consent amounts to a waiver of its claim. See *Ex Parte Peru*, *supra*, at pages 589, 590; *Puerto Rico* v. *Ramos*, 232 U.S. 627, 632; *Matter of United States of Mexico* v. *Schmuck*, 293 N.Y. 264, 274.

Petitioner also relies on *United States* v. *Pink*, 315 U.S. 203, for the proposition that the retention of jurisdiction by the New York courts over property within the jurisdiction of New York State runs counter to a federal policy of attempting to obtain compensation for American citizens. As evidence of such a federal policy, it refers to Public Law 85-604. This law makes no reference to any properties held in the custody of state courts; it prescribes a procedure pursuant to which payments from a fund established in the U. S.

Treasury Department shall be disbursed to United States nationals.

Petitioner lays more stress on the May 12, 1960, letter of the State Department (Letter No. 6, p. 6, above), which it cites for the proposition that the release of the property of the Czechoslovak Government "was necessary to the conclusion of negotiations between the United States and Czechoslovakia for a settlement of the claims of American citizens arising from the nationalization program of the Czechoslovak Government" (see page 11 of the petition). The actual text of the letter refutes this proposition, for it makes it clear that agreement has in fact been reached between the Czechoslovak and the United States Governments on the basis "that the lump sum now agreed upon in principle in settlement of such claims will be reduced *pro tanto* by the market value of those properties" for which sovereign immunity has been suggested but which are not released. See Op. App. Div., p. 22a.

Petitioner's case in relying on the pendency of negotiations with the Czechoslovak Government for an overall claims settlement is no stronger now than when this Court dismissed the appeal in *Zivnostenska Banka* v. *Stephen*, 356 U.S. 22. It was then pointed out that negotiations for such a settlement had been pending since 1946. As indicated by the Appellate Division, the *Pink* case is not applicable except where the federal policy has taken the form of a compact or treaty with a foreign government (Op. App. Div. 23a, 24a; see also pp. 2a-3a, below and Respondent's Motion to Dismiss Appeal in *Zivnostenska Banka* v. *Stephen*, *supra*, pp. 4 to 7).

Another indication of the insubstantiality of the issue raised by petitioner is that the Foreign Claims Settlement Commission has completed the Czecho-

slovak claims program contemplated under Public Law 85-604 and rendered awards totaling $113,645,205.41, see letter from the Chairman of the Foreign Claims Settlement Commission, Appendix "B" hereto. By contrast, the total value of the listed securities covered by the State Department's letters relating to sovereign immunity in *both Stephen* v. *Zivnostenska Banka and* this proceeding is estimated to be from $250,000 to $350,000, see Zivnostenska Record, p. 208, the bulk of which is not involved in this proceeding. The alleged deprivation to claimants under the federal statute, assuming *arguendo* that this proceeding is the proper one to redress it, is *de minimis*.

The basic justification underlying the doctrine of sovereign immunity is to avoid the affront to the dignity of an independent national sovereign implicit in making it or its instrumentalities answerable to judicial process, see Lauterpacht, *The Problem of Jurisdictional Immunity of Foreign States*, 28 British Yearbook of International Law 220, 232 *et seq.* (1951); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 Amer. Journal of International Law 93 (1953). That purpose is obviously no longer possible of accomplishment, for petitioner and the property standing in its name had been in court for more than seven years before the State Department first issued a suggestion of immunity, close to four years ago. This case hardly seems to be the type of situation that would "imperil the amicable relations between governments and vex the peace of nations," upon which the courts' deference to the State Department's expressions of policy in the field of foreign relations is grounded, see *United States* v. *Pink*, 315 U.S. 202, 233.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

SIGMUND TIMBERG
Attorney for the Respondent
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Washington 5, D. C.

APPENDIX "A"

Opinion of Supreme Court for New York County (Lupiano, J.) on Renewed* Motion for Modification of Judgment in Stephen v. Zivnostenska Banka

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN, *Plaintiffs*,

—against—

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, also known as Zivnostenska Banka, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank, *Defendant*.

Defendant heretofore moved for an order modifying the restraining provisions contained in the judgment entered on August 6, 1956, and in previous orders of this court. That application was disposed of by a decision of this court, dated February 18, 1960. Thereafter, defendant moved to reargue but submitted new matter. The court, at a hearing held on June 21, 1960, and upon consent of the parties agreed to consider this motion as one to renew. It is so treated.

Plaintiff, a creditor of defendant, brought the action, pursuant to Section 977-b of the Civil Practice Act, for the appointment of a permanent receiver of the assets of defendant, within the State of New York. The complaint was predicated upon the ground that the defendant had been nationalized by decree of the Republic of Czechoslovakia, dated October 24, 1945. Judgment was granted in favor

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* This is the second opinion of the Supreme Court for New York County; the opinion on the original motion is in Zivnostenska Record, pp. 235-243.

of plaintiff on August 6, 1956, and the permanent receiver appointed thereunder.

The judgment in part provided as follows: "1. That the plaintiff, Otto Augstein, have judgment against the defendant, Zivnostenska Banka, National Corporation, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank, for the relief demanded in the complaint herein, to the extent warranted by the provisions of section 977-b of the Civil Practice Act. 2. That the defendant, Zivnostenska Banka, National Corporation, pursuant to decree No. 102 of the Republic of Czechoslovakia, its Law No. 31 of 1950 and Proclamation No. 383 of its Ministry of Finance, was nationalized within the meaning and contemplation of section 977-b of the Civil Practice Act; has ceased to do business; no longer exists; and it has not the capacity or willingness to meet its obligations and responsibilities to its creditors and stockholders. 4. That said Receivers be, and they hereby are directed to take, receive and reduce to their possession, and to liquidate and reduce to cash, any and all assets, credits, choses in action and other property, tangible and intangible, within the State of New York of the defendant Zivnostenska Banka, National Corporation." The judgment further provided that the restraining provisions in the orders of May 3, May 12 and May 21, 1952, were continued in force and effect and injunction was extended to cash deposits and securities held by the financial institutions in the name of the Statni Banka:

The judgment was affirmed by the Court of Appeals (3 N. Y. 2d 862). Upon application of defendant the remittitur was amended by adding thereto the following: "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of estab-

lished principles of constitutional law and in conflict with the foreign policy of the United States. This court held that there was no such violation or conflict" (3 N. Y. 2d 931).

Defendant then appealed to the Supreme Court of the United States. The appeal was dismissed "for want of a substantial federal question" (356 U. S. 22).

The personal property sought to be released herein is held by various financial institutions in the name of defendant and the State Bank of Czechoslovakia (hereinafter called Statni Banka).

The previous application was based upon a suggestion of immunity, filed by the Department of State of the United States, through the offices of the United States Attorney for the Southern District of New York. The suggestion stated in part that the Secretary of State "accepts as true the statement of fact of the Czechoslovak Government that the listed cash and securities constitute the property of the State of Czechoslovakia and that consequently the United States Government recognizes and allows the claims of the Czechoslovak Government that such property in the United States is immune from execution or other action analogous to execution." The United States Government did not intervene as an interested party but presented the suggestion of immunity as a matter of comity between the Government of the United States and the Government of Czechoslovakia. The property involved is listed in Annexes 1 and 2, and the Czechoslovak Government claimed that the property listed in Annex 1 was acquired by it through the defendant and the property listed in Annex 2 was acquired by it through Statni Banka. The letter of June 22, 1959, from the State Department of the United States requests the United States Attorney "to present to the court the views of the Department and also to inform the court that the Department of State accepts as true the statement of fact of the Czechoslovak Government

in its note of June 16, 1959, above that the attached securities as listed in Annex 1 and 2 of that note constitute the property of the State of Czechoslovak."

On the return date of that application, opposing affidavits were submitted by certain third parties claiming ownership to some of the very property to which the Czechoslovak Government asserted immunity. Moreover, defendant had filed a proof of claim with the receiver on October 7, 1957, in which defendant stated that the "true owners" of certain of the property were persons other than Statni Banka. The ownership of such property is now asserted to be in the Czechoslovak Government.

Subsequently, an affidavit of an Assistant United States Attorney was filed with the court. Attached thereto was a photostatic copy of a letter dated December 19, 1959, written by the Assistant Legal Adviser of the State Department of the United States to the Chief, General Litigation Section of the Department of Justice. The pertinent part of that letter read as follows: "As Mr. Evan was advised on a recent visit to this office, the suggestion of immunity filed in the Zivnostenska Banka case by the United States Attorney at the instance of the Department of State was not intended to be a determination by the Department of any controversy between his client and the Government of Czechoslovakia as to the ownership of any securities involved in the case or to deprive his client of the opportunity of establishing ownership of any securities. *It follows that the Department had no intention of suggesting that any property not owned by the Government of Czechoslovakia was immune from execution or from proper disposition by the Court*" (Italics mine). This court then held that a judicial rather than a political question was presented, denied that application, but granted leave to the Government of Czechoslovakia to prove its claim of ownership (see Stephen v. Zivnostenska Banka, 23 Misc. 2d 855). The Czechoslovak Government did not avail itself of that op-

portunity but made the present application, which originally was one for reargument.

Submitted and received upon this application is new matter in the form of a photostatic copy of a letter dated May 12, 1960, written by the Legal Adviser of the Department of State of the United States to an Assistant Attorney-General of the United States. That letter, in part, states: "Inasmuch as it is our view that the Court's opinion in the Stephen case indicates a misunderstanding of the position of the Department of State with respect to the immunity from execution of property of the Czechoslovak State involved in this case, it is deemed necessary to clarify our position further. The Department's position is that it recognizes and allows the claim of the Czechoslovak Government that the securities listed in Annexes 1 and 2 of its note of June 16, 1959, constitute the property of the State of Czechoslovakia and that such property is immune from execution or other action analogous to execution. The Department's letter of December 15, 1959, referred to by the Court should be read in the light of the Department's previous letter of June 22, 1959, and of the particular situation to which it was addressed. The December letter meant only that if Mr. Gellert or any other claimant in the case could prove to the Court that specific property listed by the Czechoslovak Government in the Annexes to its note as property of the State actually belonged to him as a matter of Czechoslovak law rather than to the Czechoslovak State because, for instance, the particular law in question was not intended to apply to the property or because he had complied with the necessary legal requirements to recover the property, then the sovereign immunity of the Czechoslovak State did not extend to such property. It did not mean that the Czechoslovak Government could be required to prove in Court its ownership of property to which its claim had already been recognized and allowed by the Department of State."

The constitutionality of section 977-b of the Civil Practice Act is beyond dispute (Stephen v. Zivnostenska Banka, supra; Oliner v. Am. Oriental Banking Corp'n, 252 App. Div. 212, aff'd 277 N. Y. 588). The receiver has title to the property of defendant in the State of New York pursuant to section 977-b, subdivision 19, of the Civil Practice Act, subject, of course, to true ownership.

It may very well be that the Czechoslovak Government acquired title to the listed property through nationalization. This acquisition is again opposed in part by "true owners" and wholly by the receiver.

Nationalization decrees of foreign governments are repugnant to the public policy of the State of New York (Vladikavkazsky RR. v. N. Y. Trust Co., 263 N. Y. 369). These decrees are not given extra-territorial effect over assets which have their situs in the State of New York (U. S. v. President, &c., Man. Co. et al., 276 N. Y. 396, 977-b, subdiv. 19, of the Civil Practice Act).

The cases cited by the movant in support of its position are not apposite of the situation presented here. Moreover, no authority has been cited, nor has the court found any by its own independent research which precisely lends itself in the determination of the questions posed by this unusual set of circumstances. None involve the nationalization contemplated and interdicted by section 977-b of the Civil Practice Act. Moreover, a suggestion of immunity, such as submitted here, was not considered. Nor did title to the property vacillate and the extent of the immunity alter itself as is here demonstrated. It is to be noted the photostatic copy of the letter dated May 12, 1960, still permits "Mr. Gellert or any other claimant" to prove to the court that the specific property listed in the annexes actually belonged to them. It prescribes the method of such proof and states that such ownership must be proved under Czechoslovak law. But, from the papers submitted, the

movant seeks to have the immunity apply absolutely only to the receiver.

There are presently claimants in addition to Mr. Gellert who assert "true ownership." Whatever such ownership may be, sovereign immunity should not depend, as the State Department strives to make it do in these circumstances, on the nature of the parties against whom the privilege of immunity may be asserted, or on the nature of the claims made by those parties. It seems that the State Department may not recognize and allow the claim of the Czechoslovak Government to be the owner of the property listed in the annexes and yet allow only certain parties to prove ownership to that very property. Such responsibility of distinction should not be given to the State Department.

The suggestion of immunity presented is unique and extraordinary and greatly unlike any involved in the cases cited by the movant which treat and define the force and effect of an immunity made with clear purpose and intent of sealing off judicial action in a pending controversy. In those cases, the resultant effect is an instantaneous end of further judicial proceedings and the diversion of the whole matter, as a strict political question, into diplomatic channels. Here, the hybrid immunity does not seek nor bring about complete cessation of the judicial course but prescribes a method for judicial resolution entailing survival and continuance of the judicial proceedings in favor of one class of ownership without extending similar privilege to another class of ownership. And yet, even slight knowledge of the history of this extensive litigation, protracted over a period of eight years, will reveal that the unfavored ownership asserted by the receiver has been recognized and validated by the highest court of the State of New York and later was implicitly recognized by the highest court of our land.

The court realizes the gravity of recognizing any conclusive suggestion of immunity, but the extent to which the

court will weigh a suggestion depends upon the manner in which such immunity is suggested. It will be considered as conclusive only with respect to such statements as are within the exclusive responsibility of the executive branch of our government. However, where the suggestion makes for class distinction of ownership the court feels that the suggestion has gone beyond the pale of special competence of the executive branch. As here, its action devitalizes the suggestion as a political question since the suggestion, as finally presented, has been brought to rest on matters which, in their ultimate suggested state, require the court to retain and judicially determine them.

As further reason for such holding, one need only advert to the suggestion wherein a method of proof of ownership is imposed upon those parties who thereby are allowed to offer proof of their asserted ownership. Clearly, this phase of the suggestion is an intrusion upon the judicial function, and, moreover, is contrary to the applicable method of proof generally acceptable in our courts. Accordingly, the court is constrained to deny the motion. However, leave is granted to the Government of Czechoslovakia, if it be so advised, to appear before the referee heretofore appointed by order of the court dated July 1, 1958, who shall take proof of such ownership of the assets claimed by the Czechoslovak Government in the application and report to the court. All claimants who have appeared herein are likewise afforded such right. Settle order.

APPENDIX "B"

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON 25, D. C.

Office of
the Chairman

October 10, 1962

Sigmund Timberg, Esq.
815 15th Street, N.W.
Washington 5, D. C.

Dear Mr. Timberg:

Pursuant to your request, I am pleased to furnish you with the following information concerning the total awards made by the Commission in the Czechoslovakian Program and the amount of funds available for the payment of such awards.

Information available to the Commission discloses that the net balance of the Czechoslovakian Claims Fund after deduction for administrative expenses was approximately $8,540,750.00. The aggregate amount of initial payments on awards certified by the Commission will be approximately $2,772,150.00, leaving a balance of approximately $5,768,600.00 for the payment of pro rata shares in accordance with the provisions of the governing statute. The total amount of all awards thus certified, including principal and interest, was $113,645,205.41.

Inasmuch as the paying agency, the Treasury Department, is now engaged in the task of effecting the first distribution of the Fund, the foregoing statistics should not be considered absolute. Further information concerning this matter may be obtained by communicating with the Secretary of the Treasury, care of Investment Branch, Washington 25, D. C.

Sincerely,

EDWARD D. RE
Chairman

Office Supreme Court, U.S.
FILED
APR 4 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 883

STATNI BANKA, CESKOSLOVENSKA,

Petitioner,

—against—

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Banka,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITIONER'S REPLY BRIEF

THE ISSUE PRESENTS A SUBSTANTIAL FEDERAL QUESTION

We cannot imagine any issue that is more clearly a federal question than that of the right of a state court to ignore a clear and unequivocal State Department certification of immunity for the property of a foreign sovereign government and a request for the release of that property from the judicial restraint imposed thereon. If the state court, as petitioner here urges, was bound to respect the Suggestion of Immunity and release the property thereby certified to be immune, the judgment of the state court cannot be sustained upon any ground of state law.

The importance of this question cannot be denied, for the State Department itself pointed this out in its letter of May 12, 1960:

> "The Department of State believes that an early decision by the Court in accordance with the suggestions of immunity filed in the Stephen and Wolchok cases, as amplified in this letter, would materially contribute to the successful conclusion of the negotiations with the Czechoslovak Government referred to above" (Zivnostenska Record, p. 180, f. 538).

Moreover, the erroneous determinations of the lower courts are significant beyond the facts of this particular case since, if unreversed, they will stand as a bad precedent. No other case exists wherein a State Department Suggestion of Immunity has not been ultimately held binding upon the judiciary.

THE DEPARTMENT OF STATE NEVER WAVERED FROM ITS ABSOLUTE SUGGESTION OF IMMUNITY IN THIS ACTION

Throughout his brief, respondent mistakenly argues that the State Department repeatedly changed its position and vacillated in its views. The list of various documents and letters on pages 5 and 6 of his brief, however, contains only one document applicable to this case. That is the Suggestion of Immunity, item number 4, dated June 22, 1959, which appears in full at pages 51 to 70, inclusive, of the Statni Record. The other letters and papers were all submitted by the Department because of the peculiar circumstances of the *Zivnostenska* case which are not in any way present in this action, and had nothing to do with the facts herein. In this action, the Department of State, from the outset and throughout the entire litigation, continuously has certified the absolute immunity of petitioner from this suit and of all of its property from the restraints imposed by the Courts.

THE ISSUE IS NOT RES ADJUDICATA

A.

The *ex parte* "temporary" order in this case (Statni Record, pp. 25-30) dated March 26, 1959, restrains all property of petitioner "that may be, or be found, in the State of New York." The restraints upon petitioner's property, which had been imposed in the *Zivnostenska* case, were limited to such property as was in New York on May 12, 1952. Thus the restraining order in this action includes much more, as a comparison of the annexes to the two Suggestions will show (Zivnostenska Record pp. 66-68 and Statni Record pp. 63-67). Moreover, the present restraining order also operates *in futuro*, so that any property which petitioner brings into New York hereafter becomes automatically subject thereto, and petitioner is disabled from ever safely doing business, on behalf of the Czechoslovak Government, with any New York banking organization. Obviously the determination in the *Zivnostenska* case could not apply to the additional assets involved in this case, in any event.

B.

Moreover, the *Zivnostenska* action and judgment did not purport to pass upon title to any assets at all, either of defendant therein or of this petitioner. It merely enabled the Receiver to bring proceedings to obtain possession of property of the Zivnostenska Bank. As to the property of this petitioner, the judgment continued the restraints for a period of only ninety (90) days (which have long since passed; Zivnostenska Record p. 23, ff. 67, 68) in order to give the Receiver the time to start this action. Thus, it is only the *ex parte* restraining order of March 26, 1959, in this action, which retains petitioner's immune property within the custody of the Court. The Receiver could not assert his right to petitioner's property save by this action against

petitioner; consequently, the right of the Czechoslovak Government to claim immunity and of the State Department to recognize it, even for property restrained pending the earlier action, was obviously not foreclosed by the *Zivnostenska* judgment.

C.

Neither petitioner nor respondent were parties to the *Zivnostenska* action. Contrary to respondent's statement that petitioner voluntarily submitted its immunity to the New York court for determination in that action, the Government of Czechoslovakia, in its 1952 note to the State Department, specifically declined to permit petitioner to submit to the jurisdiction. The Court thereupon appointed *amicus curiae* to defend the immunity claim, but an *amicus curiae* appointed by the court for a foreign sovereign not before the court cannot lay the foundation for a claim of *res judicata* (*Garland Co. Ltd.* v. *Filmer*, 1 Fed. Supp. 8, 13; *Brown-Gummer Inv. Co.* v. *Paulter*, 70 Fed. 2d 184). Furthermore, since petitioner was not a party to that action, it could not and did not appeal from the denial of immunity for the property there involved, and the affirmance by the Appellate Division in 1955 was without reference to any claim of sovereign immunity for any property whatsoever.

D.

The Suggestion of Immunity in the *Zivnostenska* action specifically states that the Department of State

> "* * * has always recognized a distinction between 'immunity from jurisdiction' and 'immunity from execution'. The Department has maintained the view that in accordance with international law property of a foreign sovereign is immune from execution to satisfy even a judgment in an action against a foreign

sovereign when "there is no immunity from suit" (Zivnostenska Record p. 10, f. 119).

Dexter and Carpenter, Inc. v. Kunglig, etc., 43 Fed. 2d 705, cert. den. 282 U. S. 896;

Bradford v. Chase National Bank, 24 F. Supp. 28, 38, aff'd 105 Fed. 2d 1001, 309 U. S. 632.

Thus, the Department's position was that its failure affirmatively to suggest immunity in 1952, did not prevent it from recognizing and certifying immunity for the property here involved, when proceedings analogous to execution were undertaken in 1959.

This view was stated by the Department in the *Zivnostenska* case; in this action the Department also conclusively recognized petitioner's immunity on the ground that any transfers to petitioner had been sovereign and public acts of the Government of Czechoslovakia which cannot be questioned by our Courts (Statni Record, p. 56, ff. 167, 168).

E.

Finally, it is clear that the Secretary of State is free to recognize or deny immunity as a purely political question in any individual case. All principles of local private law must give way to the policy of the Department when it affects the relations of the United States and a foreign country. That is the entire rationale of the decisions which accept the binding nature of a Suggestion of Immunity.

Ex Parte Peru, 318 U. S. 578;

Republic of Mexico v. Hoffman, 324 U. S. 30;

Rich v. Naviera Vacuba, 197 Fed. Supp. 710, aff'd 295 Fed. 2d 24.

Consequently, the Department was clearly within its rights in certifying immunity in this new action regardless of what it did or did not do in the earlier case, in 1952.

CONCLUSION

Under the determinations of the New York courts, petitioner cannot be sued because it is immune, but its property, now or ever hereafter found in New York, continues to be subject to seizure and restraint under the order of March 26, 1959 in this action. We cannot conceive of a more deliberate disregard by any Court for the decisions of the Executive Branch made within the sphere of its exclusive competence.

The issue is one of prime importance and the petition for certiorari should be granted.

LEMUEL SKIDMORE,
Attorney for Petitioner.

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IN THE

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Petitioner,

—against—

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Banka,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITIONER'S REPLY TO BRIEF OF THE SOLICITOR GENERAL

Petitioner submits this reply to the brief filed by the Solicitor General pursuant to the order of the Court dated April 22, 1963.

In the short time allowed us for this reply, we cannot point out the many obvious inconsistencies between the Solicitor General's present brief and the position of the United States as previously represented to the New York courts in the Suggestion of Immunity (Statni Record, pp. 51-70) and the amendatory letter from the State Department of May 12, 1960 (Zivnostenska Record, pp. 175-180). We nevertheless ask the Court for a thorough review of

these documents. We believe that, upon such review, it will be apparent that in no way have we misinformed the Court as to the action and position of the State Department with respect to the immunity of the petitioner and its property. Our statement that the Suggestion of Immunity is absolute and requests release of petitioner's property is in strict accord with the documents filed with the Court by the Department of Justice at the request of the Department of State.

Even the Government's brief concedes that the United States did suggest that petitioner is immune from this suit. The brief does not deny, and it is the fact, that the Suggestion went much further and directly advised the New York courts that such property should be "released from the attachment imposed in the pending proceedings" (Statni Record, p. 69, f. 205), since the transfers of property from Zivnostenska Bank to petitioner "constitute public acts of the State of Czechoslovakia * * *" (Statni Record, p. 55, ff. 165, 166) and the Department adheres to the rule that "immunity of the foreign sovereign from suit is recognized with regard to sovereign or public acts" (Statni Record, pp. 56, ff. 167, 168). Dismissal of the action, without release of petitioner's property, was a clear denial of effect to the absolute Suggestion of Immunity, and for all practical purposes gave petitioner no immunity at all.

The Government's brief gives no attention whatsoever to the fact that the restraining order which the Courts have refused to vacate, applies to any property which petitioner may ever bring into New York State. Because of this fact, petitioner can never safely do business in New York, the banking center of the United States, unless it waives its immunity, enters this case as defendant on the merits and eventually succeeds in vacating the restraint at least as to future assets in New York.

The Government asserts that the breadth of the restraining order presents no federal questions and is a matter for petitioner to take up with the New York Courts. If this were so, then no Suggestion of Immunity would ever present a federal question and the immunity sought in any case at the behest of the United States Government could always be denied by any State court, with no recourse to this Court. We submit that a foreign sovereign's claim of immunity for its property especially after recognition thereof by the State Department is always a federal question, is always a substantial one, and is clearly one here, where unless this Court grants relief, the petitioner (the state banking institution of Czechoslovakia) can never safely do business with any bank in the State of New York.

Respectfully submitted,

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